(7)

No. 91-860

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives,

Appellants,

vs.

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative,

Appellees.

On Appeal From The United States District Court For The District Of Montana

BRIEF OF APPELLEES

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QUESTION PRESENTED

Does the standard of equal representation for equal numbers of people under Article I, section 2 of the United States Constitution, as enunciated by this Court in *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964), apply to apportionment of representatives among the several States?

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STATEMENT

The appellants' brief includes an exhaustive historical review of the statutory schemes that have governed congressional apportionment for the past two centuries. (Appellants' Br. at 5-15.) Their brief draws from that review in developing the argument that Article I, section 2 of the Constitution permits Congress virtually unfettered discretion in selecting an appropriate apportionment scheme. The appellants, however, neglected to review the historical development of Article I, section 2 itself, a history vital to the interpretation of the constitutional language. Since the standards advocated by Montana herein emanate from the principles of equal

representation that gave birth to the House of Representatives, an historical overview of the framing of Article I, section 2, as well as the construction given that section by the Second Congress, prefaces the appellees' argument.

I. CONSTITUTIONAL BACKGROUND

When the Framers of the United States Constitution met in Philadelphia in the summer of 1787, the first proposals laid before the convention by Edmund Randolph of Virginia expressed the principle of a National Legislature in which rights of suffrage "ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." 1 M. Farrand, *The Records of the Federal Convention of 1787, at* 20 (1966 ed.) (hereafter *Farrand*). The basis for representation in the National Legislature quickly became controversial; consideration of the issue was initially postponed for the reason that the delegation from Delaware was prohibited by its credentials from changing the Article in the Confederation establishing an equality of votes among the States. 1 *Farrand* at 4, 37-40.

The Virginia plan, presented by Randolph, called for two legislative branches, in which representation was to be based upon the people at large. The New Jersey plan, on the other hand, called for a unicameral legislature in which each State had an equal vote. 1 *Farrand* at 252. The Virginia plan's provision for two legislative branches was the basis upon which discussions concerning distribution of representation took place.[1] "As soon as it was settled that the legislative power should be divided into two

[1] See 1 *Farrand* at 48 (resolution "that the national Legislature ought to consist of two branches" agreed to without debate or dissent except that of Pennsylvania).

separate and distinct branches, a very important consideration arose in regard to the organization of those branches respectively." 1 J. Story, *Commentaries on the Constitution* § 572, at 422 (1851 ed.). The issue that divided the delegation was whether membership in the two branches should be proportionate to population or whether each State should have an equal voice.[2]

Intimately intertwined with that issue was whether the members of the legislature should be elected by the people or by the State legislatures. Under the Confederation, the delegates to Congress were elected by the State legislatures in all the States but two. 1 J. Story, *supra*, § 574, at 424-25. Nonetheless, the colonies were familiar with a house of representatives of some sort, "emanating directly from, and responsible to, the people." *Id.* § 573, at 422. "Experience, as well as theory, had settled it in their minds, as a fundamental principle of a free government, and especially of a republican government, that no laws ought to be passed without the co-operation and consent of the representatives of the people; and that these representatives should be chosen by themselves, without the intervention of any other functionaries to intercept or vary their responsibility." *Id.* § 573, at 423.

[2] As James Madison wrote to Martin Van Buren more than 40 years after the Convention:

> The *threatening contest*, in the Convention of 1787, did not, as you supposed, turn on the degree of power to be granted to the Federal Govt: but on the rule by which the States should be represented and vote in the Govt: the smaller States insisting on the rule of equality in all respects; the larger on the rule of proportion to inhabitants: and the Compromise which ensued was that which established an equality in the Senate, and an inequality in the House of Representatives.

3 *Farrand* at 477 (letter of May 13, 1828).

Application of the principle of popular elections to the federal government did not, however, enjoy universal agreement. Delegates Elbridge Gerry of Massachusetts and Roger Sherman of Connecticut were reluctant: the people, said Sherman, "want information and are constantly liable to be misled." 1 *Farrand* at 48. George Mason of Virginia, in contrast, opined that the larger branch of the Legislature "was to be the grand depository of the democratic principle of the Govt. It was, so to speak, to be our House of Commons – It ought to know & sympathize with every part of the community; and ought therefore to be taken not only from different parts of the whole republic, but also from different districts of the larger members of it." *Id.* at 49. Mason's sentiments were echoed by James Wilson of Pennsylvania, who cautioned that "[n]o government could long subsist without the confidence of the people." *Id.* James Madison of Virginia "thought too that the great fabric to be raised would be more stable and durable if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures." *Id.* at 50. The delegates agreed, six in favor, two against, and two divided, that the members of the first branch of the Legislature should be elected by the people rather than by the State legislatures. *Id.*

Delegates from the small States remained steadfast, however, in their position that States have equal representation, and the controversy threatened the viability of the convention itself. William Paterson of New Jersey said: "If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty." 1 *Farrand* at 251. Alexander Hamilton of New York countered that the small States' insistence on equality was "a contest for

power, not for liberty." *Id.* at 466. He questioned whether persons composing the small States would be "less free" than those composing the larger if representation were based upon number of inhabitants. "The State of Delaware having 40,000 souls will *lose power*, if she has 1/10 only of the votes allowed to Pa. having 400,000; but will the people of Del: *be less free*, if each citizen has an equal vote with each citizen of Pa." *Id.* William Samuel Johnson of Connecticut suggested that the two principles "ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the *States*." *Id.* at 461-62.

Finally, a committee was appointed, consisting of one delegate from each State, to attempt settlement of the representation issue. 1 *Farrand* at 516. The committee report recommended that each State have an equal vote in the second branch of the Legislature and that in the first branch "each of the States now in the Union shall be allowed 1 member for every 40,000 inhabitants." *Id.* at 526. The committee's report prompted considerable debate. Some delegates (*id.* at 533) believed that property, as well as number of inhabitants, should be included in the basis of representation, while others argued that the membership of new western States should be limited (*id.* at 533-34). Ultimately, the proposition regarding the basis of representation in the first branch of the legislature was referred to a committee of five. *Id.* at 538.

Postponing for a time the composition of the lower house, the delegates turned their attention to provisions concerning adjustment of its membership. Although Gouvernor Morris advocated giving the Legislature virtually unfettered discretion (1 *Farrand* at 571), the committee recommended that the requirement of a periodic census be inserted, as well as the requirement that "the Legislature shall alter or augment the representation accordingly" (*id.* at 575). Mason pointed out that the

greater the difficulty the delegates had in fixing a proper rule of representation, "the more unwilling ought we to be, to throw the task from ourselves, on the Genl. Legislre." *Id.* at 57[illegible]. He argued that revision from time to time according to some permanent and precise standard was essential to fair representation. "From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it." *Id.*

Hugh Williamson of North Carolina likewise urged the convention to make it the duty of the Legislature to do what was right and not leave it at liberty to disregard its obligations. 1 *Farrand* at 579. Agreeing, Randolph observed that the power initially allocated by the Constitution would not be voluntarily renounced, "and that it was consequently the duty of the Convention to secure its renunciation when justice might so require; by some constitutional provisions." *Id.* He continued: "If equality between great & small States be inadmissible, because in that case unequal numbers of Constituents wd. be represented by equal number of votes; was it not equally inadmissible that a larger & more populous district of America should hereafter have less representation, than a smaller & less populous district. If a fair representation of the people be not secured, the injustice of the Govt. will shake it to its foundations." *Id.* at 579-80. Randolph suggested that the Legislature's hands must be tied "in such a manner that they could not sacrifice their trust to momentary considerations." *Id.* at 580.

Madison too warned against the danger of a rotten borough system, then prevalent in England. "The power there had long been in the hands of the boroughs, of the minority; who had opposed & defeated every reform which had been attempted." 1 *Farrand* at 584. Mason, although he thought initially that the interests of the people should be left to their Representatives, knew that

the Legislature ultimately would cease to be the Representatives of the people. "As soon as the Southern & Western population should predominate, which must happen in a few years, the power wd be in the hands of the minority, and would never be yielded to the majority, unless provided for by the Constitution." *Id.* at 586. Thus, the proposal to require the taking of a periodic census and subsequent adjustment of representation was overwhelmingly approved. *Id.* at 588.

On July 16, the whole resolution regarding representation in the National Legislature, which included the original composition of the first branch thereof, was presented to the full convention. The resolution passed by a margin of five to four, with one State divided. 2 *Farrand* at 13-16. The next day, Gouvernor Morris moved to reconsider the whole resolution. The motion failed for lack of a second.[3] The Convention later approved the proposal to apportion representatives using a ratio not to exceed one for every 40,000 inhabitants, and securing to each State at least one Representative. *Id.* at 214, 221, 223.[4]

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[3] Madison's notes indicate: "It was probably approved by several members, who either despaired of success, or were apprehensive that the attempt would inflame the jealousies of the smaller States." 2 *Farrand* at 25.

[4] When referred to the Committee on Style and Arrangement, the pertinent provisions read as follows:

> [Art. IV], Sect. 4. As the proportions of numbers in the different states will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legislature shall, in each of these cases, regulate the

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After Benjamin Franklin had moved for approval of the whole Constitution on September 17, 1787, and prior to the final vote, Nathaniel Gorham of Massachusetts moved that the ratio for apportionment of Representatives be reduced from 1 for every 40,000 inhabitants to 1 for every 30,000, which he felt would lessen objections to the new Constitution. 1 *Farrand* at 643-44. President Washington then rose and, on the only occasion in which he entered into the discussions of the Convention,[5] said he "could not forbear expressing his wish that the alteration proposed might take place. It was much to be desired that the objections to the plan recommended might be made as few as possible – The smallness of the proportion of Representatives had been considered by many members of the Convention, an insufficient security for the rights & interests of the people. He acknowledged that it had always appeared to himself among the

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number of representatives by the number of inhabitants, according to the rule hereinafter made for direct taxation not exceeding the rate of one for every forty thousand. Provided that every State shall have at least one representative.

[Art. VII], Sect. 3. The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.

2 *Farrand* at 566, 571.

[5] 2 *Farrand* at 644 (Madison's notes).

exceptionable parts of the plan; and late as the present moment was for admitting amendments, he thought this of so much consequence that it would give much satisfaction to see it adopted." *Id.* at 644. The motion was agreed to unanimously. *Id.*

II. LEGISLATIVE BACKGROUND: THE FIRST APPORTIONMENT BILL

During the process of ratifying the new Constitution, five States' conventions expressed dissatisfaction with its provision for determining the composition of the House of Representatives. These States "desired that the ratio should be fixed in the organic law itself rather than left to the discretion or the caprice of Congress." U. H. Ames, *Annual Report of the American Historical Association for the Year 1896: The Proposed Amendments to the Constitution of the United States During the First Century of Its History* 43 (1897). In response, James Madison introduced in the First Congress an amendment to provide for a fixed ratio. *Id.*[6]

The second session of the First Congress enacted a law for the nation's first census of population. The 1790

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[6] As finally proposed to the States, the amendment read:

After the first enumeration, there shall be 1 Representative for every 30,000 until the number shall amount to 100, after which the proportion shall be so regulated by Congress that there shall be no less than 100 Representatives nor less than 1 Representative for every 40,000 persons until the number of Representatives amount to 200, after which the proportion shall be so regulated that there shall not be less than 200 Representatives nor more than 1 Representative for every 50,000 persons.

II H. Ames, *supra*, at 44. Although it received the necessary 2/3 approval of Congress, the amendment fell one state short of securing ratification. *Id.*

census, which took one and one-half years to complete, reported a population of 3.6 million.[7] When the Second Congress took up the matter of apportioning representatives based upon the enumerated population, the pivotal issue became one of interpreting the Constitution's requirement of "one for every thirty Thousand." U.S. Const. Art. I, § 2, cl. 3. The debate focused on whether the aggregate population of the nation should be divided by 30,000 to obtain the number of Representatives, which would then be apportioned among the States according to their respective numbers, or whether the ratio applied to each State.[8] Throughout the House debates regarding the

[7] *See* H.R. Doc. No. 234, 22d Cong., 1st Sess. 2 (1832); C. Eagles, *Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in the 1920s* 23 (1990).

[8] *See* 3 Annals of Cong. 243 (1792) (Rep. Benson: "the Representatives of the United States shall amount to a certain number, according to the whole number of the people, say one to thirty thousand"); *id.* at 249 (Rep. Sedgwick: "representation is to be apportioned to classes of thirty thousand in each State," and "to allow a Representative to be chosen by a less number than thirty thousand, would be an open violation of the express words of the Constitution"); *id.* at 255 (Rep. Ames: "Though Congress is to apportion the members, the rule of apportionment is fixed; the number of Representatives will be one hundred twelve[,] . . . to be apportioned to each State according to its numbers"); *id.* at 265 (Rep. Madison, expressing opinion that if aggregate numbers were to be used, the State boundaries would be meaningless, and the United States might as well be one district); *id.* at 266 (Rep. Boudinot: "the whole number of Representatives, to be chosen by the whole people of the Union, was the subject contemplated by the Constitution"); *id.* at 408 (Rep. Williamson: "by the Constitution, whatever ratio was adopted it is to be applied as a divisor to the number of persons in each State *respectively*") (emphasis in original).

first apportionment bill,[9] equality in the population of House districts was also an important concern.[10] Whether such equality would best be achieved by a ratio of one for every 30,000 or some other number was the subject of much discussion,[11] as was the desire that the membership be as large as possible and that the constitutionally-expressed ratio be observed.[12]

[9] Debates in the Senate were not reported. *See* Chafee, *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1022 n.21 (1929).

[10] *See* 3 Annals of Cong. 246 (1792) (Rep. Ames, suggesting that inequality of bill was apparent where "Virginia, with six hundred and thirty thousand inhabitants, would have as many members as six of the smaller States, whose aggregate numbers exceeded those of Virginia upwards of seventy thousand"); *id.* at 258 (Rep. Ames: "thirty thousand citizens, residing where they may, must possess civil rights and powers equal to thirty thousand in any other part of the Union; yet, . . . this bill, . . . directs that thirty thousand in Virginia shall have as much power as near sixty thousand in Delaware and several other States"); *id.* at 272 (Rep. Sedgwick: "equality is among the most essential principles of representation, and expressly provided for by the Constitution").

[11] *See id.* at 243 (Rep. Livermore, supporting a ratio of one for 33,000 persons, "enlarged on the inequality in the representation from the great fractional numbers which would result from the ratio of thirty thousand"); *id.* at 259 (Rep. Ames: "The ratio of 33,000, though not free from exception, is less unequal [than the ratio of 30,000], and leaves less unrepresented fractions"); *id.* at 265 (Rep. Madison: "The ratio of thirty-three thousand . . . will give a more equal representation than that of thirty thousand").

[12] *See id.* at 201 (Rep. White: "The question now is, whether the people shall have that share of influence in the Government to which they are entitled by the Constitution, which plainly contemplates one Representative for every thirty

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After considerable disagreement between the two houses of Congress, the House of Representatives finally approved, by a two-vote majority, the Senate's proposal for a House of 120 members.[13] The bill became the subject of the first Presidential veto.[14] After obtaining the opinions of Secretary of State Jefferson, Secretary of the Treasury Hamilton, Secretary of War Knox, and Attorney General Randolph,[15] George Washington transmitted his veto message to the House of Representatives, expressing his opinion that the bill was unconstitutional.[16] The basis for the veto was twofold. First, as Jefferson observed, the ratio was not uniform for all of the States;[17] while the

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thousand persons"); *id.* at 244 (Rep. Findley, advocating "for adhering to the principle as that contemplated in the Constitution . . . ; despatch of public business, and a Republican representation of the people, he conceived were distinct things; he therefore should have been in favor of a larger representation"); *id.* at 273 (Rep. Laurance: "said he had always advocated a large representation, without any reference to the part of the Union from which the members are to come. Thirty thousand will give the largest number that we can get").

[13] 3 Annals of Cong. 482 (1792).

[14] *Id.* at 539.

[15] *See* H.R. Doc. No. 234, 22d Cong., 1st Sess. (1832).

[16] 3 Annals of Cong. 539 (1792).

[17] H.R. Doc. No. 234, *supra*, at 6. Attorney General Randolph agreed that a uniform ratio for apportionment must be applied; "otherwise, the omission would, of itself, be glaringly unconstitutional, as creating a precedent for leaving the number of the House of Representatives, and the distribution of that number, at the mere will of every different Congress." *Id.* at 10. Jefferson recommended the disregard of fractions of population, because in every instance the fractions fell below the constitutional minimum of 30,000 persons. *Id.* at 6.

ratio for some States was one Representative for every 30,000 inhabitants, to eight States a Representative was allotted for every 27,700. Second, the latter ratio expressly violated the Constitutional maximum of one Representative for every 30,000 inhabitants which, the President concluded, "is by the context and by fair and obvious construction to be applied to the separate and respective numbers of the States."[18] Following the veto, the House reconsidered the measure and applied a ratio of one Representative for every 33,000 persons, resulting in a House of 105 members.[19]

SUMMARY OF THE ARGUMENT

Montana's claim that 2 U.S.C. § 2a(a) violates Article I, section 2 of the United States Constitution presents a justiciable controversy for resolution by this Court. The pivotal issue in this case is whether the Constitution requires that Representatives be apportioned among the States in such a manner as to achieve, as nearly as practicable, population equality among congressional districts. That Congress is vested with the power to apportion Representatives does not insulate its exercise of such power from judicial review. In view of appellants' position that Article I, section 2 may be enforced judicially, the merits of Montana's claim must be examined in spite of the political question defense. The parties' dispute arises out of the proper construction of Article I, section 2, which contains both a grant of authority and, by use of the phrase "according to their respective Numbers," a limitation on such authority. The issue concerning the precise nature and scope of that limitation is one of

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[18] 3 Annals of Cong. 539 (1792).

[19] *Id.* at 548.

constitutional interpretation, a matter emphatically within the province of the Court.

Both the literal language of Article I, section 2 and its historical development support Montana's position that the Constitution demands equal representation for equal numbers of people, a standard well established as governing the apportionment of congressional districts within the States and equally applicable to apportionment of Representatives among the States. Clause 1 and clause 3 of Article I, section 2, when construed in harmony with each other and in light of the Framers' intent, require that representation in the House be determined solely by the number of a State's inhabitants and distributed so as to give, as nearly as may be, each person an equal voice in the National Legislature. As the Court's reapportionment jurisprudence has unequivocally established, this standard requires that population equality among congressional districts be the fundamental goal of any reapportionment.

The present apportionment violates the right of Montana voters to equal footing in the electoral process. Application of 2 U.S.C. § 2a(a) results in disparity among district populations that could be reduced by employment of a different reapportionment scheme. That precise mathematical equality is an impossibility does not excuse the population differences that have occurred in this case, particularly where – as here – those differences could be diminished. Where voting rights are at stake, the Constitution demands strict scrutiny of governmental action. Presently, the population disparity has unconstitutionally devalued the votes of all Montanans and denied them fair and effective representation.

Whether or not Congress is constitutionally required to enact legislation to effect each new apportionment of Representatives is not before the Court. The issue was not

decided by the District Court and was not raised by either party in the questions presented for review. If the Court should rule against Montana on the issues properly presented, this issue should be remanded for determination by the District Court.

Finally, the appellants' argument that the District Court's judgment has no effect for the apportionment predicated on the 1990 decennial census misinterprets the judgment and ignores the District Court's finding that Montana voters are unconstitutionally prejudiced by the present reapportionment scheme. The District Court clearly issued its permanent injunction to secure appropriate representation for the next decade in the House and in the electoral college.

ARGUMENT

I. DETERMINATION OF THE EQUITY STANDARD IMPOSED ON CONGRESS UNDER ARTICLE I, SECTION 2 WITH RESPECT TO THE APPORTIONMENT OF REPRESENTATIVES DOES NOT CONSTITUTE A NONJUSTICIABLE POLITICAL QUESTION.

The appellants argue that a court is foreclosed from review of Congress's apportionment decisionmaking unless it is "plainly contrary to an explicit textual limitation" in Article I, section 2, clause 3. (Appellant's Br. at 28.) They admit the phrase "according to their respective Numbers" is properly viewed as constituting one such "textual limitation" but contend it requires only that the assignment of House seats be rationally related to the States' various populations. (*Id.* at 24, 27, 28.) The appellants proceed to suggest that the first, and perhaps most important, ground for political question status identified

in *Baker v. Carr*, 369 U.S. 186 (1962)[20] – "a textually demonstrable commitment of the issue to a coordinate political department" – exists since the method of equal proportions effects apportionments with direct reference to state population. (*Id.* at 28-29.) They further suggest that the remaining five *Baker* formulations independently support a finding of nonjusticiability. (*Id.* at 29-34.) Not only is the appellants' treatment of the textual commitment factor inconsistent with the very purpose of the political question doctrine, but the associated analysis also directly conflicts with their reliance on the remaining *Baker* factors which, in any event, have no applicability here. The appellants' political question reasoning thus largely refutes itself.

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[20] In relevant part, *Baker* stated:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

A. Inapplicability of the First *Baker* Factor.

No one disputes that the apportionment of seats within the House of Representatives is committed to Congress under Article I, section 2, clause 3. *See Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842) ("the power to apportion representatives after [the decennial] enumeration is made, is nowhere found among the expressed powers given to Congress, but it has always been acted upon as irresistibly flowing from the duty positively enjoined by the Constitution"). That Congress is allocated power over a particular matter nonetheless has never been viewed as automatically insulating its exercise of such power from judicial review. Article I, section 8, clause 4 of the Constitution, for example, authorizes Congress "[t]o establish a uniform Rule of Naturalization," but in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), the Court rejected application of the political question doctrine, even while recognizing that "[t]he plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, [since] what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Id.* at 940-41. Characterizing as a political question the involved alien's claim that a legislative veto provision in 8 U.S.C. § 1254(c)(2) was invalid would therefore transform "virtually every challenge to the constitutionality of a statute [into] a political question." *Id.* at 941; *see generally* Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 605 n.27 (1976) ("the courts consider daily whether the political branches exercise power textually committed to them with due respect for constitutional limitations or prohibitions"). The issue here is similarly not whether Congress is charged constitutionally with the duty of apportioning Representatives but whether, in discharging that duty, it

has maintained fidelity with the Constitution's requirements. It is this issue against which the appellants' political question defense must be measured.

Paradoxically, the appellants concede not only that the Court may resolve such issue but also that the Court *must* reach it to decide their nonjusticiability claim. (Appellants' Br. at 28-29.) To the extent the political question doctrine is viewed as barring determination of a controversy's merits, the appellants effectively admit the justiciable nature of Montana's challenge to 2 U.S.C. § 2a(a). *See generally* Henkin, *supra*, 85 Yale L.J. at 599 ("[I]n 'pure theory,' a political question is one in which the courts forego their unique and paramount function of judicial review of unconstitutionality. . . .[T]he courts say to the plaintiff in effect: 'Although you may indeed be aggrieved by an action of the government, although the action may indeed do violence to the Constitution, it involves a political question which is not justiciable, not given to us to review[ ]' "); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3534, at 456-59 (2d ed. 1984). Even decisional authority relied upon by the appellants underscores the illogic of their position. *Goldwater v. Carter*, 446 U.S. 996, 1006 (1979) (Rehnquist, J., concurring) ("[s]ince the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed"); *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990) ("Although the basis in fact inquiry is the narrowest form of judicial review, . . . it is nevertheless a review of the merits of the Secretary's decision. . . .Even that level of review carries with it the possibility that the court might reverse the Secretary's determination in a particular case"); *McIntyre v. McCloskey*, 766 F.2d 1078, 1081 (7th Cir. 1985) ("[b]ecause

the dispute is not justiciable, it is inappropriate for a federal court even to intimate how Congress ought to have decided").

The appellants' position, moreover, renders this matter strikingly similar to *Powell v. McCormack*, 395 U.S. 486 (1969). There, the substantive issue was the propriety of the House of Representatives' refusal to seat Adam Clayton Powell in the 90th Congress despite his admitted possession of the standing qualifications specified in Article I, section 2, clause 2. The congressional defendants contended that, by virtue of the House's power under Article I, section 5 to "be the Judge of the . . . Qualifications of its own Members," the determination not to seat Powell was nonjusticiable. The Court prefaced its analysis of the political question issue with a recognition that such issue's resolution turned on the meaning of the term "Qualifications" in Article I, section 5:

> If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are "inextricable from the case at bar."

Id. at 520-21. Once the constitutional interpretation issue and the inapplicability of the remaining *Baker* factors were resolved in Powell's favor, he necessarily prevailed on the merits of his claim. *Id.* at 550. Thus, while the Court's analysis of the textual commitment factor was

nominally directed to the existence *vel non* of a political question, in actuality it determined the controversy's merits.

Here, the parties disagree over the proper construction of the phrase "according to their respective Numbers" in Article I, section 2, clause 3. If the appellants prevail on the theory that such phrase allows Congress to use any population-based apportionment formula, the choice of a particular formula becomes a matter of congressional discretion. Conversely, if the lower court's and Montana's construction is accepted, that phrase imposes an obligation on Congress to apportion in a manner which, to the greatest extent possible, minimizes the absolute population disparity between congressional districts. Irrespective of the construction adopted by this Court, since the appellants agree that such requirement may be enforced judicially, their political question defense demands that the merits of Montana's claim be resolved.

B. Inapplicability of the Remaining *Baker* Factors.

The appellants additionally urge that the other *Baker* factors counsel the presence of a nonjusticiable controversy. Reliance on *Baker*'s non-textual commitment factors, however, irreconcilably conflicts with their concession that courts do have the authority to determine whether, in apportioning Representatives, Congress has complied with the requirements of Article I, section 2, clause 3.[21] Even if the inherent inconsistency of the

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[21] In *Powell*, unlike here, the congressional defendants did not concede that courts possessed authority to adjudicate alleged violations of Article I, section 5 under any circumstances; i.e., no judicial review was admitted as available to an

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appellants' position is disregarded, none of the other *Baker* formulations warrants finding Montana's challenge to the equal proportions apportionment formula nonjusticiable.

To suggest that "a lack of judicially discoverable and manageable standards" exists to resolve Montana's claim or that such resolution is impossible "without an initial policy determination of a kind clearly for nonjudicial discretion" (Appellants' Br. at 30) simply ignores the facts. As the appellants themselves painstakingly develop, each of the accepted divisor methods has mathematical qualities which best achieve one or more "measures of equity." (*Id.* at 12-13.) The Dean method is recognized as minimizing the absolute difference in average district sizes – the number of persons per Representative – while the equal proportions method minimizes the relative difference between the number of persons per Representative and the relative difference between the share of each person in a Representative. (Mot. to Aff. at App. 12-App. 13) (Tiahrt Aff. ¶¶ 4, 5); I J.A. at 24 (Ernst Decl. ¶ 13). No dispute exists over the relationship between the formulae and the various measures of equity; the issue is whether, as Montana contends, Article I, section 2 requires Congress to ensure that the population of congressional districts is as close as possible in absolute terms. This matter accordingly presents a question which, far from being so exotic as to defy a court's competence to resolve, entails exercise of the most basic

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individual alleged to have been wrongfully deprived of House membership regardless of the meritoriousness of his claim. It was thus necessary there to consider applicability of the other *Baker* factors.

form of decisionmaking by the federal judiciary: constitutional interpretation. *Cf. United States v. Munoz-Flores*, 110 S. Ct. 1964, 1971 (1990) ("[t]o be sure the courts must develop standards for making the revenue and origination determinations, but the Government suggests no reason that developing such standards will be more difficult in this context than in any other"); *Davis v. Bandemer*, 478 U.S. 109, 123 (1986) ("The mere fact . . . that we may not now . . . perceive a likely arithmetic presumption in the instant context [of alleged political gerrymandering] does not compel the conclusion that the claims presented here are nonjusticiable. The one person, one vote principle had not yet been developed when *Baker* was decided. . . .[T]he Court contemplated simply that legislative line drawing in the districting context would be susceptible of adjudication under the applicable constitutional criteria").[22]

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[22] Curiously, the appellants cite *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), for the notion that the third *Baker* factor applies here. (Appellants' Br. at 30.) In *Japan Whaling*, however, the Court explicitly reaffirmed the role of courts in construing constitutional and statutory provisions. *Id.* at 230 ("As *Baker* plainly held, . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting in excess of [international] quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below"). To argue, as the appellants do, that the failure of the Constitution "to single out" one of the various measures of equity as controlling

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Resolution of Montana's challenge to use of the equal proportions method also does not implicate the fourth *Baker* factor – "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" In *Munoz-Flores*, the validity of a federal statute requiring a "special assessment" to be imposed upon conviction for certain crimes was alleged to violate the Origination Clause in Article I, section 7, clause 1. The United States argued that resolution of such claim would evince disrespect for the House of Representatives, since the House by approving the bill implicitly concluded no Origination Clause flaw existed, and was therefore a political question. The Court rejected the government's position, accepting that the United States may "be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a 'lack of respect' for Congress' judgment" but adding immediately that, were the disrespect referred to in *Baker* intended to include mere disagreement over a law's validity, *"every*

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means that *any* of them is acceptable and that Congress's "initial policy determination" may not be reviewed is to assume precisely what is at issue – the proper interpretation of Article I, section 2 with respect to Congress's House apportionment responsibility. The appellants' reliance on *Burns v. Richardson*, 384 U.S. 73, 92 (1966), for the applicability of this *Baker* factor is no less misplaced. In *Burns*, a state reapportionment case, the Court was careful to point out that reapportionment choices do not offend the Constitution "[u]nless a choice is one the Constitution forbids." *Id.* In support of this principle, the Court cited *Carrington v. Rash*, 380 U.S. 89 (1964), which held that a choice which deprives persons of an "equal opportunity for political representation," 380 U.S. at 94, is a choice the Constitution forbids.

challenge to a congressional enactment would be impermissible." 110 S. Ct. at 1698 (emphasis in original). Nothing in the text of Article I, section 2 warrants a different result here. That provision contains a grant of authority but, by use of the phrase "according to their respective Numbers," also imposes a limitation on such power. The precise nature and scope of the limitation lie at the core of Montana's claim. *See, e.g., United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . .Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803), that '[i]t is emphatically the province of the judicial department to say what the law is[ ]' "); *Powell*, 395 U.S. at 549 ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility").[23]

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[23] Although not included as part of their analysis of the fourth *Baker* factor's applicability, the appellants make a related argument in connection with distinguishing *Baker* because here, unlike there, "[a]ppellees seek review of *Congress's* apportionment of Representatives *among* the States . . . [and their claim] goes to the heart of the separation of powers and the 'relationship between the judiciary and the coordinate Branches of the Federal Government.' " (Appellants' Br. at 24; emphasis in original.) Were this distinction pursued to its natural conclusion, essentially all of the political question analysis in *Baker* would have been unnecessary since that decision involved malapportionment of a state legislature.

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Lastly, the fifth and sixth *Baker* factors do not support the appellants' nonjusticiability claim. The apportionment of House districts, whether on the federal or state level, is necessarily a task undertaken within significant time constraints, but none of the Court's decisions has ever intimated that such constraints, standing alone, are an appropriate basis upon which to find "an unusual need for unquestioning adherence to a political decision already made[.]" Such need has instead arisen "most of the time, if not always, in the area of foreign affairs." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 250 (1985). The Court accordingly stated in *Baker* that many foreign relations questions "uniquely demand single-

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More telling, though, is the fact that, even prior to *Baker*, the Court had found congressional apportionment cases justiciable. *See Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964) (summarizing cases); *Baker*, 369 U.S. at 232-33 (same). In so holding, the Court rejected the contention, perhaps most fully developed by Justice Frankfurter's plurality opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), that Congress possesses exclusive authority to resolve disputes over apportionment of Representatives. Neither *Baker* nor the other cases suggest that Justice Frankfurter's analysis concerning the power of Congress to remedy congressional district malapportionments was faulty; rather, they concluded that congressional authority in this area did not preclude the exercise of judicial power. The appellants also identify no reason why the right to a nondiluted vote in congressional elections, which was said in *Wesberry* to be "too important in our free society to be stripped of judicial protection" where state legislative action was involved (376 U.S. at 7), should be any less deserving of judicial vindication when the malapportionment is effected by Congress. In sum, the separation-of-powers distinction proffered by the appellants has no analytical significance independent of the fourth *Baker* factor which, for those reasons discussed above, does not warrant invoking the political question doctrine.

voiced statement of the Government's views." 369 U.S. at 211. In the analogous area of hostilities duration, "[d]ominant is the need for finality in the political determination, for emergency's nature demands 'A prompt and unhesitating obedience[.]' " *Id.* at 213. The specter of "embarrassment from multifarious pronouncements by various departments on one question" is equally chimerical since, once the merits of Montana's claim are addressed, the meaning of the phrase "according to their respective Numbers" presumably will be settled. *See Chadha*, 462 U.S. at 942 (stating that resolution of a challenge to the constitutionality of a congressional veto provision was "for the Court to resolve" and that, upon such resolution, "there is no possibility of 'multifarious pronouncements' on this question").[24]

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[24] The appellants argue that an as-yet-unissued decision in *Massachusetts v. Mosbacher*, Civ. No. 91-11234-WD (D. Mass.), may "create irreconcilable demands upon a fixed number of representatives" and lead to a "judicially driven Balkanization process[.]" (Appellants' Br. at 33.) It is nonetheless unclear how these purported demands will occur. If the appellants' position on the merits is accepted, the Commonwealth of Massachusetts will stand in no better position than Montana; if Montana's position prevails, Massachusetts' reliance on the Webster method and, implicitly, the measure of equity associated with that method – minimizing the absolute difference between any two states with respect to a person's share of a Representative – must be deemed unfounded. Were the Court to reject both the appellants' and Montana's positions on the merits, its decision almost certainly would provide sufficient guidance for determination of Massachusetts' claim. Similarly unhelpful to their political question analysis is the appellants' discussion of supposed difficulties in formulating appropriate relief. (Appellants' Br. at 31-32.) The relief issue, discussed below at pages 47-50, does not implicate the "multifarious pronouncements" factor since, again, multiple conflicting resolutions of

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II. ARTICLE I, SECTION 2 OF THE CONSTITUTION SECURES THE RIGHT OF THE PEOPLE TO EQUAL REPRESENTATION IN THE HOUSE OF REPRESENTATIVES.

A. The Historical Development of Article I, Section 2 Supports the District Court's Holding that Population Equality Is the Fundamental Goal of the House of Representatives.

Drawing from the debates of the Constitutional Convention, the District Court concluded that "Article I, section 2, imposes upon Congress the same duty to 'meet the standard of equal representation for equal numbers of people as nearly as is practicable,' . . . when apportioning Congressional districts that it imposes upon state legislatures." (J.S. at 12a.) Vital to the court's holding was its observation that the debates of 1787 "centered on the issue of how seats should be apportioned to states, not on how state legislatures should draw districts within states." (*Id.* at 10a.)

The appellants argue that this "unprecedented" ruling is undercut by the historical basis upon which reapportionment of the House of Representatives has been effected by Congress and ignores the broad discretion with which Congress is vested under the Constitution. (Appellants' Br. at 22, 34.) Rather than attempting to circumscribe Congress's duties in apportioning membership of the House, the appellants suggest, the delegates to the Constitutional Convention were more concerned with the "larger issue" of the overall composition of the Legislative Branch. *Id.*

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the apportionment issue are highly unlikely among the courts and even less likely between the "various departments" of the federal government.

There was, however, no larger issue before the Convention than the basis of membership in the National Legislature.[25] The Great Compromise, which saved the Convention from irreconcilable dissension, was made possible by the guarantee that membership in the first branch of the legislative body would be determined by numbers of inhabitants in the States, while States would be secured an equal voice in the Senate. Equal representation for equal numbers of people became the *raison d'être* of the House of Representatives. James Wilson, admonishing the delegates that "Waters of Bitterness have flowed from unequal Representation,"[26] reminded them that they were forming a government for *individuals*, not for "the imaginary beings called *States*." 1 *Farrand* at 483.

When the committee appointed to consider the issue of representation recommended that membership in the first house be based upon a ratio of one for every 40,000 inhabitants, the committee resolved that "the 1st. branch would be the immediate representatives of the people, the 2d. would not." 1 *Farrand* at 544 (Mason). In the days preceding the Great Compromise, Madison pointed out: "Representation was an expedient by which the meeting of the people themselves was rendered unnecessary; and

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[25] Charles Pinckney, during the 1788 ratification debates in the South Carolina Legislature, said: "After much anxious discussion, – for, had the Convention separated without determining upon a plan, it would have been on this point, – a compromise was effected, by which it was determined that the first branch be so chosen as to represent in due proportion the people of the Union; that the Senate should be the representatives of the states, where each should have an equal weight." 3 *Farrand* at 249.

[26] J. Hutson, *Supplement to Max Farrand's The Records of the Federal Convention of 1787* at 133 (1987).

that the representatives ought therefore to bear a proportion to the votes which their constituents if convened, would respectively have." 2 *Farrand* at 8.[27]

The debates of the federal convention belie appellants' claim that the Framers intended Congress to have essentially unbridled discretion in determining the composition of the House. On the contrary, the delegates feared that, once vested with authority, those in control of Congress would guard it jealously and fail to readjust the balance of power unless directed by the express mandate of the Constitution to do so. Delegate Sherman cautioned that "the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." 1 *Farrand* at 582. Concurring, Mason argued that the Convention should not require of the Legislature "something too indefinite & impracticable, and leaving them a pretext for doing nothing." *Id.*; *see also supra* at 6-7. In the end, the delegates virtually were in unanimous agreement that express direction be given to the Congress to enumerate the population on a periodic basis and to "arrange the representation accordingly." 1 *Farrand* at 588-89.

The history of the first apportionment bill reflects the same expectation that Representatives have equally-populated constituencies. *See supra* at 11-13. Indeed,

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[27] The records of the Constitutional Convention show that appellants' contention that the Framers intended to disregard all "fractions" is misplaced. (Appellants' Br. at 34 n.28.) In context, the quoted statements regarding "fractions" relate either to the discussion of slaves – and whether they should be counted as "fractions" of a person to determine representation (1 *Farrand* at 559-62) – or to a discussion of the apportionment of taxes until such time as a census had been taken (*id.* at 600-03; 2 *id.* at 357-58). Consequently, for purposes of the issue under consideration, no significance should be attributed to these comments.

President Washington was compelled to veto the measure because it did not uniformly apply a ratio of persons per Representative to each of the States. Notably, the fractions "smaller than the common ratio" to which Jefferson referred in his memorandum to the President were those segments of a State's population which contained less than 30,000 people and for which, by the express terms of the Constitution, a Representative could not be allotted. H.R. Doc. No. 234 at 6. Violation of this ratio in contravention of the Constitution was ground for Washington's veto. 3 Annals of Cong. 539 (1792).

Above all other considerations, the records of the Second Congress reflect an overriding concern for equality, *"as nearly as may be,"* in the numbers of persons in each district. *Id.* at 246 (Rep. Niles) (emphasis in original). *See supra* at 10-13. Members of the House recognized that, notwithstanding the impossibility of obtaining precise equality, their inability to "do complete justice" did not justify them in failing to do justice "to any degree whatever." *Id.* at 273 (Rep. Kittera). Ultimately, they agreed upon a ratio of one Representative for every 33,000 persons, which brought about the least amount of inequity between district populations and complied with the Constitutional ratio. *See supra* at 10-11, 13. This is the "contemporaneous and weighty evidence of [the] true meaning" of Article I, section 2, to which the Court should ascribe significance. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

B. Clause 1 and Clause 3 of Article I, Section 2 Must Be Construed in Harmony and Consistent With Precedent Establishing the "One Person, One Vote" Standard.

"Article I, § 2, establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers

of people.' " *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). The "one person, one vote" standard enunciated by this Court in *Wesberry* requires that, to the greatest extent practicable, Congressional districts must have equal populations. 376 U.S. at 7-8. "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. . . .Therefore, the command of Art. I § 2, . . . permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

The appellants argue that the "one person, one vote" standard applicable to the redrawing of congressional districts within State boundaries is inapplicable to the apportionment of Representatives among the States because the standard was drawn from clause 1 of Article I, section 2, requiring that Representatives be chosen "by the people of the several States." (Appellants' Br. at 44-45.) They maintain that "Clause 3 does not mention the 'People' of the several States – and therefore does not suggest that it confers on the People of a State any personal rights with respect to the apportionment of Representatives by Congress." (*Id.* at 45.) Thus, since clause 3 provides for apportionment of Representatives to the States themselves,[28] the appellants reason, the District Court's application of the principles of *Wesberry* was without textual basis. *Id.*

The appellants' argument stands Article I, section 2 on its head. "Every provision in a constitution must be interpreted in the light of the entire document[,] . . . and

[28] This is a surprising argument, in view of the appellants' position below that the State of Montana lacked standing to bring the instant action. *See* R. 19 at 46-47.

all constitutional provisions are of equal dignity and, if possible, should be construed in harmony with each other." *Tom v. Sutton*, 533 F.2d 1101, 1105-06 (9th Cir. 1976) (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974), and *Ullman v. United States*, 350 U.S. 422 (1956)). Clause 1 and clause 3 cannot be artificially isolated and interpreted independently of each other. Both grew out of a preeminent concern of the Framers that the *people* of the Nation be the foundation of the House of Representatives, so that it in turn would be the "grand depository of the democratic principle of the Govt." 1 *Farrand* at 48.

As this Court observed in *Wesberry*, "[t]he debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to *each State* should be determined *solely* by the number of the State's inhabitants." 376 U.S. at 13 (emphasis added). Indeed, the underlying rationale for the strict rule laid down in *Wesberry* was the Court's concern that the "principle solemnly embodied in the Great Compromise – equal representation in the House for equal numbers of people – " would be undermined if the Court allowed States to give some voters a greater voice than others in choosing a Congressman. *Id.* at 14.

Many of the passages quoted in *Wesberry* were taken from the debates concerning the basis of representation in the House of Representatives. 376 U.S. at 13-16. Review of the records of the Convention shows clearly that election by the people went hand in hand with the notion of equal representation. *See supra* at 3-5. Randolph observed that the existing Congress created by the Articles of Confederation had engendered dissatisfaction among the people, for the reason that, "inadequate as Congress are in point of representation, elected in the mode in which they are,

and possessing no more confidence than they do," the Congress was ill-equipped to provide for "harmony among the States." 1 *Farrand* at 256. The Framers were vigilant to avoid a system of boroughs, such as that in England, which would allow a minority to govern. *See id.* at 449-50 (Wilson), 584 (Madison). Thus, "numbers were surely the natural & precise measure of Representation." *Id.* at 605 (Wilson).

Justice Black, dissenting in *Colegrove v. Green*, 328 U.S. 549 (1946), observed that the purpose of apportionment "among the several States according to their respective numbers" is "obvious: It is to make the votes of the citizens *of the several States* equally effective in the selection of members of Congress. It was intended to make illegal a nation-wide 'rotten borough' system *as between the States*." 328 U.S. at 570 (emphasis added). Emphasizing that "the policy laid down in the Constitution [is] that, so far as feasible, votes be given equally effective weight," Justice Black argued that "legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, 'whether accomplished ingeniously or ingenuously.' " *Id.* at 571 (citations omitted).

Neither its historical context nor the language of the Constitution itself supports the narrow and twisted reading of Article I, section 2 that the appellants advocate. Clause 1 and clause 3, construed – as they must be – in harmony with each other and in such a way as to give equal dignity to both, require that apportionment "among the several States" be governed by the standard of equal representation for equal numbers of people intended by the Framers to dictate the composition of the House of Representatives. As the District Court concluded:

> The rationale underlying the *Wesberry* opinion actually has more relevance to the national

> apportionment issue than to intrastate redistricting. In essence, the Supreme Court simply precluded any state from indirectly violating the national standard of "equal representation for equal numbers of people" through its intrastate redistricting actions[.]

(J.S. at 10a.)[29] Painstaking precision in the drawing of Congressional district boundaries within the States is hollow indeed if apportionment at the national level is poisoned. "[I]t would be incongruous to interpret [Article I, section 2] as imposing more stringent . . . limits on the states than the draftsmen imposed on the Federal Government." *Marsh*, 463 U.S. at 790-91. Article I, section 2 commands the apportionment of Representatives among the States to achieve, as nearly as is practicable, equal representation for equal numbers of people.[30]

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[29] All three judges agreed that the *Wesberry/Karcher* analysis is applicable to the nationwide apportionment issue. (J.S. at 22a-23a) (O'Scannlain, J., concurring and dissenting).

[30] Nothing in the enactment of the Fourteenth Amendment changes the interpretation to be given Article I, section 2. Authorities cited by the appellants in support of their argument that the Fourteenth Amendment somehow incorporated the prior practice of Congress are inapposite. *See, e.g., Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378-82 (1983) (reenactment of statutes where "contemporary legal context" had been established by prior court decisions is evidence that Congress intended to incorporate court decisions). Conversely, "[i]n the use of congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare or have not in fact occurred, the weight of the mere

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III. 2 U.S.C. § 2a(a) VIOLATES THE PRINCIPLE OF EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE AND HAS DEPRIVED APPELLEES OF THEIR RIGHT TO AN EQUAL VOICE IN THE HOUSE OF REPRESENTATIVES.

A. The District Court Did Not Err in Finding That Montana Satisfied Its Burden of Showing That Disparities in District Population Under the Present Apportionment Are Not Unavoidable.

Under the analysis of *Wesberry* and *Karcher*, Montana bore the initial burden of demonstrating that the population differences among districts could have been reduced or eliminated by a good-faith effort to draw districts of

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presence of acts on the statute book for a considerable time as showing general acquiescence in the legislative assertion of a questioned power is minimized." *Myers v. United States*, 272 U.S. 52, 170, 171 (1926). Further, "historical patterns [alone] cannot justify contemporary violations of constitutional guarantees." *Marsh*, 463 U.S. at 790. Since enactment of the Fourteenth Amendment preceded *Wesberry* and other landmark reapportionment decisions by nearly 100 years, there is no "contemporary legal context" by which to gauge Congressional intent. As discussed *supra* at 27-30, construction of Article I, section 2, to require that congressional districts be of equal population to the extent practicable is supported both by the debates of the Constitutional Convention and by the discussions held in the Second Congress when debating the first reapportionment bill. An historical review reveals that, in enacting section 2 of the Fourteenth Amendment, Congress was predominantly concerned with the enforcement language regarding suffrage rights of blacks, and that little consideration was given to the wording of the first clause. II H. Ames, *supra*, at 51-52. Accordingly, the context in which the Fourteenth Amendment was adopted sheds little light on the interpretation of the language at issue herein.

equal population. Once that showing was made, the burden shifted to the appellants to prove "that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 730-31. Population equality between districts is "the preeminent, if not the sole, criterion" by which constitutionality of the apportionment is to be judged. *Chapman v. Meier*, 420 U.S. 1, 23 (1975). Thus, the salient fact examined by the District Court was the variation in population between congressional districts and comparison of those districts with the ideal district size. (J.S. at 13a-15a.)

Despite the appellants' exhaustive review of the various mathematical methods available to determine reapportionment, this case does not require intimate scrutiny of mathematical formulae or an examination of which formula produces the least amount of bias between large and small States.[31] Nor does the case require the Court to choose between mathematical formulae that all achieve some measure of equity and to impose that choice upon Congress. Rather, this case presents the *legal* issue, as discussed above, whether Congress is to be governed by the standards this Court has held applicable to apportionment of congressional districts. If the Court finds such standards applicable, it must further find, in order for Montana to prevail, that the District Court did not err in concluding that appellees have shown disparity in the

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[31] Indeed, if absence of mathematical "bias" between "large" and "small" States is the test by which apportionment is to be measured, recent studies indicate that the Hill method does not in fact enjoy superiority. *See* M. Balinski & H.P. Young, *Fair Representation: Meeting the Ideal of One Man, One Vote* 73-77 (1982). Under this Court's reapportionment jurisprudence, however, the test is not to compare arbitrarily defined "groups" of states, but to compare the population of each district to the ideal district size.

size of Congressional districts that could have been reduced by use of a different reapportionment scheme. The mathematics of the issue are valuable only to show whether and how the disparities between district population can be diminished, and which apportionment scheme best satisfies the standards applicable to apportionment of congressional districts.

There is no dispute that the method of harmonic means (Dean method) "is optimal with respect to the absolute difference between the numbers of persons per representative." (I J.A. at 24 (Ernst Decl. ¶ 12).) Thus, "the minimum absolute difference in the average population per district is achieved by the method of harmonic mean." L. Schmeckebier, *Congressional Apportionment* 18 (1941); *see also* M. Balinski & H.P. Young, *supra*, at 49; Appellants' Br. at 9a (1948 National Academy of Sciences Report). The method of equal proportions (Hill method), in contrast, achieves the "minimum *relative* difference per share in a representative and [the minimum *relative* difference] in the average population per district." L. Schmeckebier, *supra*, at 18 (emphasis added).[32] Montana

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[32] Mathematicians engaged in study of the apportionment problem have, over the years, devised various measures of "equity" which are reflected in the different apportionment methods. Although there has been disagreement between them as to which method produces the most mathematically equitable apportionment, the mathematicians all have shared one common trait: they have analyzed the problem as a mathematical one, rather than as a constitutional one. As discussed *supra* at 27-34, Article I, section 2 imposes a standard of population equality among congressional districts. Examining a person's share in a Representative requires employment of an artificial standard because it is measured by determining the number of Representative *per million people*. Schmeckebier, *The Method of Equal Proportions*, 17 Law & Contemp. Probs. 302 (1952). It is

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demonstrated before the District Court that application of the Dean method to the 1990 census figures to determine apportionment of Representatives among the States would in fact have produced less disparity between the population of congressional districts. (II J.A. at 68 (Hill Aff. Ex. G).)

First, comparing the States of Montana and Washington[33] to the ideal district size, Montana's single congressional district under the Hill method, with a population of 803,655, exceeds the ideal district size of 572,466 by 231,189 persons.[34] In contrast, under the Dean method Montana's congressional districts, each with a population of 401,828, would differ from the ideal by 170,638 persons. Washington's nine districts under the Hill method, each with a population of 543,105, would contain 29,361 fewer persons than the ideal district. Applying the Dean method, Washington's eight districts each would have a population of 610,993, exceeding the ideal by 38,527. Under the Hill method the difference between the average size of Montana and Washington congressional districts is 260,550 persons, while under the Dean method the difference is 209,1t 5 persons. A necessary corollary to

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not, then, simply the reciprocal of the number of persons per Representative and is not an accurate device for obtaining equal representation for equal numbers of people, as that standard has been applied in apportionment cases. Likewise, apportionment should not be calculated solely by reference to a state's "quota," which does not take into account the number of persons per Representative.

[33] These are the only two States for which application of the Dean method brings about a different result than that effected by the method of equal proportions. (II J.A. at 68 (Hill Aff. Ex. G).)

[34] See Mot. to Aff. at App. 13-App. 14 (Tiahrt Aff. ¶¶ 7-11).

the reduction of the difference in average district size is the creation under the Dean method of congressional districts more closely approximating the ideal size of 572,466 persons. Second, as illustrated by the graph appended to the affidavit of Montana's principal expert (Mot. to Aff. at App. 21 (Tiahrt Aff. Ex. B)), application of the Dean method reduces not only the absolute population disparity between the average congressional districts in Montana and Washington but also the range of disparity among *all* congressional districts grouped by State average.[35]

The appellants rely upon the partial dissent of Judge O'Scannlain in support of their argument that the method

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[35] Application of the Adams method, which has also been called the method of smallest divisors and the method of included fractions, results in the minimum range between the largest and smallest districts under 1990 census figures. (Mot. to Aff. at App. 21 (Tiahrt Aff. Ex. B).) The Adams method minimizes the overrepresentation of any state, i.e., results in the smallest absolute "representation surplus." (*Id.* at App. 13 (Tiahrt Aff. ¶ 6)); *see* L. Schmeckebier, *Congressional Apportionment*, at 40-49. Professor Walter Willcox, who was the author of the method of major fractions used in the 1930 apportionment (Appellants' Br. at 6a), later became an advocate of the Adams method for the reason that it "secure[s] the closest possible approach to equality in the population of Congressional districts." Willcox, *The Apportionment Problem and the Size of the House: A Return to Webster*, 35 Cornell L.Q. 367, 388 (1950). Willcox contended that, since the Adams method "apportions representatives one after another to the state which then has the largest district population," it is the optimal method for equalizing the district populations of the several States. *Id.* at 389; *see also* Willcox, *Last Words on the Apportionment Problem*, 17 Law & Contemp. Probs. 290, 300 (1952). While the Adams method minimizes the size of the largest district (Mot. to Aff. at App. 21 (Tiahrt Aff. Ex. B)), the Dean method brings each district closer to the ideal size in absolute terms. *See* M. Balinski & H.P. Young, *supra*, at 49.

of equal proportions "minimizes the total variance of the 435 congressional districts in the Nation from the ideal (nationwide average) district size" (Appellant's Br. at 42), as well as the "sum of the absolute deviations from the ideal district size" (*id.* at 42 n.38). Aggregation of the differences between all congressional districts and the ideal district size, however, shows nothing because it may, and under 1990 census figures does, mask the fact that not every district is brought as nearly as practicable to the ideal and because the one person, one vote standard is satisfied only if *Representatives* are *apportioned* in such a manner as to ensure that the population of *each* district approaches the ideal size. Aggregation of the district populations within each state, therefore, produces misleading results, since it does not reflect the actual number of persons per Representative. The Framers clearly understood that State boundaries posed a practical limitation on the feasibility of establishing equally-populated congressional districts, but they just as clearly intended that Representatives be apportioned among the States so that each represented, as much as possible, the same number of persons.

Equally misplaced is the appellants' reliance upon "mathematical variance." Mathematicians sometimes speak of "variance" in describing dispersion of data around a particular point. When used with respect to congressional districts, variance in this sense is the sum of the squares of the deviations by each charted district from the ideal district size divided by one less than the number of districts charted (I J.A. at 29 (Ernst Decl. ¶ 23)) – not "the sum of the squares of the deviations by each district from the ideal district size" (Appellants' Br. at 42 n.38). The terms "variance" and "deviation," however, have been used by the courts in reapportionment cases to define *absolute differences in population* between actual

congressional districts and the ideal district. *See, e.g., Karcher*, 462 U.S. at 728-29; *Kirkpatrick*, 394 U.S. at 529-31; *White v. Weiser*, 412 U.S. 783, 785 (1973); *Doulin v. White*, 528 F. Supp. 1323, 1324, 1329 (E.D. Ark. 1982). Comparison of absolute differences in district populations is a simple process of subtraction, one in which the courts have engaged throughout their analysis of reapportionment cases. Examining the entire apportionment plan, the relevant inquiry requires calculating the overall disparity between district populations. *See, e.g., Kirkpatrick*, 394 U.S. at 528-29 (districts which varied from ideal by a range of 12,260 persons below it to 13,542 above it, representing a percentage difference ranging from 3.13 percent above ideal to 2.84 percent below ideal, constituted unacceptable population deviations).

The appellants have at no time suggested that the method of equal proportions can produce less disparity in absolute numbers of persons per representative than that produced by the Dean method. They do not disagree that application of the Dean method to the 1990 Census data would in fact produce less population disparity in congressional districts from the ideal district size. The numbers "reflect real differences among the districts" which could have been reduced by a good-faith effort to achieve population equality. *Karcher*, 462 U.S. at 738.[36]

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[36] Two other ill-conceived arguments by the appellants warrant brief mention. They erroneously compare the results of two different apportionment schemes in arguing that the deviation is only 8.7 percent from the ideal district size (Appellants' Br. at 47), when in fact the pertinent inquiry is to compare actual district sizes to the ideal under a given apportionment scheme. Applying the Hill method to the 1990 census figures results in a total population disparity

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B. Appellants Have Not Shown That the Disparities in Congressional District Population Are Justified.

The appellants argue that the Court should uphold the constitutionality of 2 U.S.C. § 2a(a) because the method of equal proportions is "rationally tied" to the population of the several States and therefore Congress's judgment should not be disturbed. Further, the appellants claim, given the population differences among the States, any apportionment method will result in large disparities between districts and therefore no method should be constitutionally preferred over another. (Appellants' Br. at 46-48.)

The District Court rejected the appellants' argument that mathematical impossibility is an excuse for failure to

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between the largest and smallest congressional district of 347,680, representing a range amounting to 61 percent from the ideal district size. (Mot. to Aff. at App. 14) (Tiahrt Aff. ¶ 11).) That range is reduced to 52 percent under the Dean method and to 50 percent under the Adams method. (*Id.*)

The appellants also erroneously rely upon case law involving *state legislative redistricting* in arguing that the disparity is insufficient to trigger further scrutiny. (Appellants' Br. at 47.) Redistricting of state legislatures is analyzed under the Equal Protection Clause of the Fourteenth Amendment, not under Article I, section 2. See *Reynolds*, 377 U.S. at 567-68. Moreover, even under equal protection principles, the disparities in the present apportionment scheme would fail to pass constitutional muster, since there exists a readily available statistical method for more closely approximating the equal representation goal of the one person, one vote standard and no reason, other than misapprehension of the governing constitutional rule, for not apportioning under such method. Even "[t]he Equal Protection Clause demands no less than substantially equal . . . representation for all citizens, of all places as well as of all races." *Id.* at 568.

strive for the fundamental goal of population equality among districts. (J.S. at 14a n.3, 16a-17a.) Giving little weight to the appellants' argument that the method of equal proportions was the result of studied consideration by Congress,[37] the court emphasized that "[p]opulation equality with each district is *the* goal under the Constitution, not *a* goal[.]" (*Id.* at 17a.)

The District Court's observation that "each number represents a person whose voting rights are potentially impacted by the population disparities" (J.S. at 14a n.3) underscores the fallacy in the appellants' approach to this case. They characterize the issue as whether Congress should be permitted broad discretion in matters concerning its own membership. As the District Court recognized, however, what is at stake in this case is the right of a Montana voter to participate on equal footing in the National Legislature with voters of other States. This is a matter "close to the core of our constitutional system." *Carrington v. Rash*, 380 U.S. 89, 96 (1965). This Court has made clear that "at some point or level in size, population variances *do* import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation." *White*, 412 U.S. at 792-93 (emphasis in original).

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[37] The court observed that the debate in 1941 was characterized as a struggle between Michigan and Arkansas for the 435th Representative. (J.S. at 16a n.6.) Under the method of major fractions, Arkansas was slated to lose one of its seven seats in the House, while Michigan was to increase its number of seats from 17 to 18. However, if the method of equal proportions were used, there would be no change in either State's representation. Since the votes ultimately followed party lines, it has thus been suggested that "political expediency had a heavier hand" than mathematical virtue in adoption of the method of equal proportions. M. Balinski & H.P. Young, *supra*, at 71.

It has long been settled that government action will be given strict scrutiny when it impinges on the exercise of fundamental constitutional rights or liberties. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973). Among such fundamental rights is the right to vote. Each citizen has a "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Consequently, infringement of that protected right must be accorded strict scrutiny, and must be shown by the government to be " '*necessary* to promote a *compelling* state interest.' " *Id.* at 337 (quoting *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 (1969)). "[R]egulation of the electoral process receives unusual scrutiny because 'the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.' " *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

Given the fundamental status enjoyed by the right to participate equally in the electoral process, Congress cannot be held simply to a rationality standard in apportioning Representatives among the States. "Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Reynolds*, 377 U.S. at 567. Impossibility of achieving precise equality does not lessen the fact that an apportionment alternative is presently available to the Congress which will result in congressional districts whose populations more closely approximate the ideal district size.[38]

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[38] "The facts of life do not neatly lend themselves to the niceties of constitutionalism; but neither does the Constitution

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Although in implementing the stated purpose of a constitutional provision Congress may select the policy which in its judgment best effectuates the constitutional aim, it still must act "[w]ithin the limits of the constitutional grant." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). Congress may not transgress constitutional restrictions when exercising its plenary authority. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). This Court has recognized that even "plenary and exclusive power" vested in a coordinate branch of government, " 'like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.' " *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936)).

The constitutional constraints applicable to the issue *sub judice* strike at the heart of the notions upon which a democratic government is premised. The Constitution requires that, to the greatest extent practicable, each person's vote in a congressional election be worth as much as another's and, therefore, that each Representative in Congress represent the same number of constituents. When the equality of voting rights has been debased by an apportionment that fails to accord equal representation for equal numbers of people, that apportionment does not measure up to constitutional standards. By adhering to past "considerations of practical politics," *Kirkpatrick*, 394 U.S. at 533, the appellants have failed to show justification for the disparities in district population that have occurred as a result of 2 U.S.C. § 2a(a).

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tolerate any result, however distorted, just because it is the product of a convenient mathematical formula which, in most situations, may produce a tolerable product." *Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 327 (1968).

IV. WHETHER CONGRESS IS CONSTITUTIONALLY REQUIRED TO ENACT LEGISLATION TO EFFECT REAPPORTIONMENT FOLLOWING THE DECENNIAL CENSUS IS NOT PROPERLY BEFORE THE COURT.

Appellants argue that the district court erred in concluding that the self-executing reapportionment process implemented under 2 U.S.C. § 2a violates the Constitution. (Appellants' Br. at 48-49.) Although Montana raised this issue in its second claim for relief,[39] the District Court did not reach it in ruling on the parties' cross-motions for summary judgment. (J.S. at 18a n.9.) To the extent the District Court considered Congress's inaction over the last 50 years, it did so only in the context of discussing the lack of a "good faith" effort to bring about population equality among congressional districts to the greatest extent practicable. (*Id.* at 18a-19a.)

The appellants did not present in their Jurisdictional Statement a question regarding the second claim in the complaint. The questions presented in their brief on the merits also do not include this issue. Montana did not raise the issue in its Motion to Affirm. Pursuant to Sup. Ct. R. 14.1(a) and 18.3, only the questions set forth in the appellants' Jurisdictional Statement are to be considered by the Court. Further, since the District Court expressly declined to consider this issue, the matter should be remanded for consideration by the lower court should this Court rule against appellees on the questions properly presented in the appeal.

[39] *See* Mot. to Aff. at App. 6-App. 7 (Complaint ¶¶ 23-29).

V. THE DISTRICT COURT JUDGMENT UNAMBIGUOUSLY ENJOINS THE APPELLANTS FROM EFFECTING THE 1990 HOUSE APPORTIONMENT IN ACCORDANCE WITH 2 U.S.C. § 2a.

The appellants suggest in their brief, as they did in the Jurisdictional Statement, that the District Court's judgment has no effect for the apportionment predicated on the 1990 decennial census. (Appellants' Br. at 32 n.26; J.S. at 24 n.19.) They reason that, while the District Court declared 2 U.S.C. § 2a unconstitutional and enjoined them from reapportioning the House of Representatives thereunder, the 1990 apportionment has already been effected and cannot now be altered. Their proffered interpretation of the judgment below is implausible.

The District Court declared 2 U.S.C. § 2a unconstitutional and enjoined the appellants "from effecting reapportionment of the House of Representatives" under that provision. (J.S. at 19a.) However parsed, the injunction unambiguously requires the appellants to cease giving effect to the apportionment determination under 2 U.S.C. § 2a(a) predicated on the 1990 census. That the judgment fails to refer specifically to the 1990 apportionment does not mean, as the appellants seemingly believe, that it was intended only to affect the apportionment under the year 2000 census. (J.S. at 25 n.19.) Not only was the District Court's substantive analysis of the merits directed to Montana's claim deriving from the 1990 apportionment (*id.* at 8a), but its determination with respect to the appellees' standing – which the appellants do not contest now – was premised on the former's demonstration of "a substantial likelihood that adoption of an apportionment method which results in the least amount of disparity in district size will also result in the apportionment of two congressional districts to the State of Montana" (*id.* at 45a) under 1990 census figures. The District Court fully

realized what is otherwise obvious: This case was initiated not to resolve an abstract legal issue but to secure appropriate representation for the next decade in the House and the electoral college. (Mot. to Aff. at App. 2, App. 6 (Complaint ¶¶ 5, 22).)

The judgment accordingly fulfills the traditional role of injunctive relief – "forbidding the continuation of a course of conduct" found to be unlawful. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2942, at 377 (1973).[40] The appellants' interpretation strips the injunctive relief from the factual context giving rise to this litigation and ignores the prejudicial impact which the 1990 apportionment, if carried forward, will have on the voting rights of Montana citizens. The District Court judgment instead places the burden on Congress to enact legislation embodying the constitutionally appropriate formula and providing for apportionment of Representatives under such formula on the basis of the 1990 census.[41]

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[40] Although the judgment's permanent injunction is perfectly capable of being characterized as prohibitory in nature since it orders the appellants to give no further effect to the 1990 apportionment, it conceivably can be viewed also as a mandatory injunction phrased negatively. *See generally* Klein, *Mandatory Injunctions*, 12 Harv. L. Rev. 95, 98 (1898) ("The form adopted at an early day for [mandatory] injunctions . . . was negative instead of positive. It restrained the defendant from permitting a condition of affairs which he had wrongfully brought about, occasioned or suffered to exist, from continuing any longer"). Whether characterized as prohibitory or mandatory, the injunction precludes the appellants from giving any effect to the President's 1991 statement transmitted under 2 U.S.C. § 2a(2) or the certificates of entitlement forwarded under 2 U.S.C. § 2a(b).

[41] *Amicus curiae* State of Washington raises the issue whether it is an indispensable party under Fed. R. Civ. P. 19.

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Finally, the assertion by *amicus curiae* State of Washington that Montana has not congressionally redistricted in accordance with the District Court's judgment (Washington Br. at 6) is incorrect. On January 16, 1992, the Governor of Montana signed into law a measure requiring the state's districting and apportionment commission to reconvene for the purpose of preparing a plan for two congressional districts. Sen. Bill No. 2, 52d Mont. Legis., Special Sess. The bill directs Montana's Secretary of State to accept declarations of nomination for, and to place on the June 2, 1992 primary election ballot, two congressional Representatives, unless a final determination is

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(Washington Br. at 17-20.) This issue was not argued by the appellants below or in their Jurisdictional Statement and therefore should not be considered. *E.g., United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). Nonetheless, it bears mention that, "[i]n litigation involving the adjudication of public rights, non-parties who may be adversely affected by a decision in plaintiff's favor do not have a protectable interest which would require their joinder under Rule 19." 3A *Moore's Federal Practice* ¶ 19.07[2.-0], at 19-100-01 (2d ed. 1989). Professor Moore has concluded further that Rule 19(a) implicitly incorporates the limitation in Fed. R. Civ. P. 24(a)(2) on intervention as a matter of right where "the applicant's interest is adequately represented by existing parties." 3A *Moore's Federal Practice* ¶ 19.01-1[5.-6], at 19-38 ("[i]t appears . . . that despite the retention in Rule 24(a) of the representation qualification in 1966, without carrying it over into the revision of Rule 19 the same year, a person adequately represented so as to deprive him of a right to intervene normally is not a person to be joined if feasible under Rule 19(a), and *a fortiori* is not indispensable under Rule 19(b)") (footnote omitted). Presently, the appellants have defended 2 U.S.C. § 2a(a) vigorously, thereby protecting any interest Washington may have in the statute's validity. *See generally* 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1909, at 332-34 (2d ed. 1986) (collecting adequacy of representation cases decided under Rule 24(a)).

made that Montana is entitled to only one Representative. The legislation took effect immediately, and the Montana Districting and Apportionment Commission already has completed its plan for two congressional districts and submitted the same to the Secretary of State. Montana is prepared to go forward with its congressional elections whether it is ultimately determined to have one Representative or two.

CONCLUSION

Article I, section 2 requires that Representatives be apportioned among the States according to their respective numbers. In view of its literal language, and in the context of its historical and legal development, this constitutional provision dictates that, to the greatest extent practicable, each Representative represent the same number of people. 2 U.S.C. § 2a(a) fails to meet this constitutional standard. Congress should be directed to apportion the number of Representatives in the House in a manner which brings the population of each congressional district as near as possible to the ideal district size. The District Court's judgment should be affirmed.

Respectfully submitted,

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